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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,216	12/02/2003	Eric T. Best	88265-7617	2147
29157	7590	09/27/2006		
BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135				
			EXAMINER PADEN, CAROLYN A	
			ART UNIT 1761	PAPER NUMBER

DATE MAILED: 09/27/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/725,216

Applicant(s)

BEST ET AL.

Examiner

Carolyn A. Paden

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 11 April 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 12-2-03.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

The IDS filed December 2, 2003 has been considered to the extent that the foreign and US references were filed or are available. The NPL documents were not considered because they are not in the file.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Whistler (5,445,678) in view of Mrs. Bateman's.

Whistler discloses sub granular crystalline starch as a fat substitute. The starch is formed into a particle having a size ranging from 0.1 to 10 microns. Although "microspheres" are not specifically mentioned in connection with this product, it is clear from the Background and Summary of the Invention that microspheres are intended to be prepared. The source of starch for the product is disclosed at column 3, lines 31-32 is corn, wheat and potato starch. The microcrystalline starch is described to be a substitute for all or a portion of the fat content in processed foods (column 3, lines 50-54). The claims appear to differ from Whistler in the recitation of the use of the microspheres in a reduced fat coating. The

claims appear to differ from Whistler in the recitation of the use of the starch fat substitute in a coating composition. Mrs. Bateman's teaches recipe formulations wherein the fat in the recipe is replaced with her low fat baking butter compound, which is made from maltodextrin, butter and oil. At pages 101 & 108 frosting is prepared from a recipe that does not include water. Although the percentage of ingredients is not mentioned, it would have been obvious to expect the fat content to fall within the range of the claims, based upon the ingredient ration in the recipe. It would have been obvious to utilize the microspheres of Whistler in the formulation of the frosting because Mrs. Bateman teaches that it is well known to substitute low fat formulations for high fat formulations in fat coatings, such as frosting. It is appreciated that "sugar glass" is not mentioned but combinations of liquid sugar and crystalline sugar are well known for use in frostings. No unobvious or unexpected result is seen from the selection of sugar glass, in particular, for use in coatings, such as frosting. It is also appreciated that the use of guar gum in combination with egg albumin and starch is not mentioned but to include other known ingredients in a frosting formulation would have been an obvious matter of choice with respect to the particular recipe that is chosen. It is finally appreciated that the taste of

the product is not mentioned but no difference is seen between the frosting of the claims and the frosting of Whistler in view of Mrs. Bateman's. With regard to drying, it would have been obvious to expect the frosted confectionery to dry upon standing in air.

Claims 1-20 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-20 of copending Application No. 10/596,157. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

No claim is allowed.


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

The prior art further shows the state of the art relating to microspheres. Singer (4,911,946) teaches microspheres as fat substitutes that are made from starch and carbohydrate sources. Stark (5,021,248 and 5,145,702 and 5,330,778) shows microspheres as fat substitutes that are made from protein. Whistler (5,651,828) teaches microspheres as fat substitutes that are made from starch hydrolysates.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



CAROLYN PADEN 9-22-06  
PRIMARY EXAMINER 1761